IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 483 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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JIVABHAI BHAYABHAI KHACHAR - Appellant
Versus
STATE OF GUJARAT - Opponent

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Appearance :
MR.M.J. BUDDHBHATTI for Appellant,
MR.A.J.DESAI, ADDL.PUBLIC PROSECUTOR for Opponent,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 24/11/2006

ORAL JUDGMENT

The present appeal is against the order of conviction and sentence passed dated 24/4/2002 by the learned Sessions Judge, Rajkot in Special N.D.P.S. Case No.13 of 2001, whereby the learned Judge was

pleased to convict the appellant- original accused No.1 for the offence punishable under Section 15 of the Narcotics Drugs and Psychotropic Substance Act, 1985 (hereinafter referred to as the N.D.P.S. Act). The learned Judge while convicting the accused imposed six months rigorous imprisonment and a fine of Rs.200/-, in default, to undergo seven days simple imprisonment. The learned Judge acquitted the original accused No.2-Akbarbhai Rasulbhai Travadi from the charges punishable under Sections 26 and 29 of the N.D.P.S. Act.

2. The order of conviction and sentence is assailed on various grounds mentioned in paragraph No.2 of the memo of appeal and it is argued that the order of conviction and sentence is bad, erroneous and deserves to be quashed and set aside. It is prayed that the accused be acquitted from the charges levelled against him.

3. I have heard Mr.M.J.Buddhbhatti, learned Counsel appearing for the appellant and learned Addl. Public Prosecutor, Mr.Desai at length and they have

taken me through the relevant part of the oral as well as documentary evidence led during the trial.

4. To appreciate the submissions made by the learned Counsel, it would be necessary to state the case of the prosecution in brief which is reflected from the Charge framed by the trial Court at Exh.7.

4.1 It is the case of the prosecution that on 16/8/2001, Shri V.M.Chauhan, Deputy Superintendent of Police, Gondal Division received an information that the accused had addiction to consume poppy straw and had kept it in his house at village Modhuka without any valid pass or permit. The said information was noted in the Station Diary and with a view to arrange the trap two Panchas were summoned viz. Mukeshbhai Pravinbhai Vala and Inusbhai Gulabbhai Sheikh. The Panchas were informed about the secret information and were asked about their willingness to remain as Panch Witness. They had shown their willingness to remain as Panch Witness and thereafter the Panch Witnesses, so also, Police Officials were searched prior to proceed for raid. Thereafter the preliminary

Panchnama was drawn at Vichhiya Police Station. The house of the original accused No.1-present appellant was raided and search was carried out. During the search, in an iron tin, 800 gms powder of poppy straw was found in a plastic bag. The accused had not any valid pass or permit to possess the powder of poppy straw. The muddamal powder was seized and offence was registered against the original accused No.1 punishable under Section 15 of the N.D.P.S. Act. It is further the case of the prosecution that during the custody of the present appellant-accused No.1, he disclosed that he had purchased the muddamal powder from accused No.2 and therefore, the accused No.2 was arrested on 18/8/2001 and offence punishable under Sections 15, 26 and 29 of the N.D.P.S. Act was registered against him.

5. After considering the evidence led by the prosecution, the Sessions Court came to a conclusion that the prosecution was successful in establishing charges levelled against the original accused No.1-appellant herein and therefore, convicted the original accused No.1-appellant for the said offence. However, the learned trial Judge by assigning reasons that there is no

sufficient and cogent evidence against the original accused No.2 in the offence in question, by the impugned judgment dated 24th April, 2002 acquitted the original accused No.2.

6. The arguments advanced by Mr.M.J.Buddhbhatti, learned Counsel appearing for the appellant, if seen in nutshell then, it can be said that three major submissions have been made.

1. As per the ratio of the decision of this Court in case of **Hathi @ Mangalsing Ramdayalji Vs. State of Gujarat [1993 (2) G.L.R. 1747]**, the Court should hold that prosecution has failed to prove that the muddamal seized in the present case is opium poppy within the meaning of Section 15 of the N.D.P.S. Act, and therefore, on this sole ground the appeal may be allowed and the accused may be acquitted. According to Mr.Buddhbhatti, this is a covered case in light of the discussion made by this Court in the above cited decision.
2. The Panchas have not supported the case of the prosecution and the Police Officials should not be believed as to recovery of Muddamal from the conscious possession of the accused only.

Because as per the say of the prosecution, the muddamal was found lying in a closed iron tin when the house was raided and there are circumstances to show that major members were there in the house, when the raid was carried out, including the wife of the accused and therefore, in absence of any convincing evidence, the trial Court ought not to have accepted that the muddamal seized was recovered from the conscious possession of the accused and accused could have been given the benefit of doubt.

3. There is no full proof evidence as to the sealing of muddamal as laid down by this Court. The muddamal was lying at Vichhiya Police Station for number of hours and it was sent for analysis on 18/8/2001 i.e. on the third day of the seizer and the accused could have been given the benefit of this situation observing that it would not be safe to link the accused with the muddamal which was sent for analysis to the F.S.L., after this much long period.

7. Over and above the three major arguments as above, following points are also raised by Mr.M.J.Buddhbhatti, learned Counsel appearing for the appellant.

i) That the case of the prosecution, as it was placed before the trial Court does not stand.

ii) There is no evidence to record that accused was addicted to consumption of opium poppy and when the co-accused has been acquitted observing that there is no evidence as to sell of 1 kg. of opium poppy by the acquitted accused then, that ought to have been treated as an important infirmity established / proved as there is no cogent evidence as to conscious possession of the muddamal opium poppy. Though, the Deputy Superintendent of Police who is active in the entire raid from inception i.e. from the point of getting information against the accused till the premises was raided then on the strength as to genuineness of the raid carried out, he ought to have informed his Superior and there is no evidence on record to show that he had undertaken that exercise and it should not be

believed that raid was carried out by P.S.I., Vichhiya Police Station only and Deputy Superintendent of Police, Gondal was informed being superior.

8. According to Mr.Desai, learned A.P.P., the present appellant-original accused No.1 cannot be given the benefit of the ratio of the decision of this Court in case of **Hathi @ Mangalsinh Ramdayalji (Supra)** because, it can be said to be overruled by the decision of the Apex Court in case of **Ajib Singh Vs. State of Punjab, reported in 2000 (4) SCC 510**. In the case before the Apex Court, “Poppy Husk” was found and it has been held that it falls within the definition of “poppy straw” and the possession of Poppy Husk would fall within that contravention and possessing Poppy Husk would constitute offence punishable under Section 15 of the N.D.P.S. Act. In the present case, the broken pieces and parts of poppy straw were found and this fact is emerging from the Panchnama and the description of the muddamal found in the details of the F.S.L. Report which were sent for analysis.

9. In case of **Hathi @ Mangalsig Ramdayalji (Supra)** this Court had called the expert, Ajitbhai Gamit in the Court. He was examined and the answers given by this witness, including his deposition and cross-examination were found worth appreciation. The relevant paragraph 6 of the cited decision is reproduced herein, vis-a-vis the oral version of the witness examined in the Court.

"6. The first question to be answered is whether the learned Assistant Sessions Judge has erred in holding that the accused is found in possession of contraband goods. To establish this fact prosecution has examined P.S.I. Shri Chauhan (Exh.13), Police Constable Shri R.A. Sharma (Exh.15), an independent witness A.B. Chauhan (Exh.16) and a panch witness Shri R.Shivaji (Exh.11). All these witnesses support the evidence of each other in all the material particulars. It is to the effect that in the morning of 7/5/1988 at about 5:30 a.m. Near the northern stairs of Platform No.3 of Vadodara Railway Station, P.S.I. Shri Chauhan intercepted the accused. Accused had at that time on his head a jute bag. Accused was asked to put the same down and same was searched in presence of two Panchas and about 15 kg. Of posh na doda was found. This part of evidence is supported by all the prosecution witnesses. It is argued by Mr.Budhbhatti, learned Advocate for the accused that

two of the witnesses re the police personnels and third witnesses is a licensed coolie working on the Vadodara Railway Station and therefore they cannot be said to be an independent witnesses. So far as licensed coolie is concerned it cannot be said that he is under the control of police in any manner whatsoever. Coolies are issued licences by the Railway Authority to carry out loading and unloading work at the Railway Station. In our opinion, Police Authority does not come in picture for grant or refusal of licence to a coolie. Therefore, it cannot be said that A.B. Chauhan is not an independent person. Apart from this, it is now settled law that conviction can be based solely on the evidence of police personnel, if there is nothing in evidence of police to suspect or doubt his evidence whereby it can be inferred that the said Police Officer has attempted to involve the accused wrongly in the matter or that the police personnel has any axe to grind against the accused. It is true that what is against the accused in the mind of the Police Officer cannot be known by the accused himself, however one can say that from the evidence of the Police Officer, it may need corroboration. In absence of any flow in his evidence, it is improper, unjust and illegal to ask for corroboration to his evidence simply because he happens to be a Police Officer. To be Police Officer is not a stigma on the character of a person. Apart from this evidence of the Police Officer is further supported by the evidence of the panch witness Raju Shivaji (Exh.11) who is equally an

independent one and who is incidentally present on the Railway Station. Said Panch neither know the Police Officer nor knows the accused, but, he has agreed to remain present as a panch to discharge his duty as a citizen. Therefore, there is no substance in the contention of Mr.Budhbhatti that the prosecution has failed to establish possession of posh na doda of the accused and thereby the learned Additional Sessions Judge has erred in holding that the accused is found in possession of the contraband goods."

10. The backbone of the finding in this cited decision is that the prosecution is supposed to prove that it is possible to extract opium and that opium also must satisfy the definition of opium as defined in Clause (15) of Section 2 of the Act and as per that definition morphine extracted from that substance should not be less than 0.2 per cent. Thus, the extracted juice even of opium, if does not contain more than 0.2 per cent of morphine, it cannot be opium as defined under the N.D.P.S. Act. The arguments advanced before the Court is that in the present case, there is no opinion in favour of the prosecution to show that from the muddamal seized, the F.S.L. Experts were able to extract morphine of

0.2 per cent or more and hence the accused should be given the benefit of doubt.

11. But the Apex Court in case of **Ajib Singh (Supra)** quoting relevance of Section 15 of the N.D.P.S. Act made clear observation which impliedly has the effect of overruling effect of the cited decision in the case of **Hathi @ Mangalsig Ramdayalji (Supra).** I would like to reproduce the relevant paragraphs 13 and 14 of the decision in the case of **Ajib Singh (Supra)** wherein, the Apex Court has observed thus:-

"13. It is undoubtedly true that this point is being taken up for the first time in the appeal. However, it is a point of law which would have a bearing on a large number of cases. We, therefore, permit the appellant to raise this point. It is a point of law which requires to be decided.

14. We are unable to accept the arguments of Mr.Sharma and Mr.Rao. Under Section 15 the offence is in respect of "poppy straw". Even though the term "poppy husk" has not been defined in the N.D.P.S. Act, the term "poppy straw" has been defined. The term "poppy straw" includes all parts (except the seeds) of the "opium poppy". "Opium poppy" means the plant of the species Papaver. Thus except for the

send all other parts of the plant of the species Papaver would fall within the term "poppy straw". To be noted that parts of the plant Papaver would fall within the term "poppy straw" even though no juice has been extracted therefrom. For an offence under Section 15 it is not at all necessary that 'poppy straw' should have been used or made into "opium". For cultivation, producing, manufacturing, possessing, selling, purchasing, transporting, importing or exporting inter-State or using opium there is separate offence provided for under Section 18. If the alleged offence is under Section 18, then the question may arise whether the preparation contained more than 0.2 per cent of morphine. For an offence under Section 15, question of considering whether the preparation contains more than 0.2 per cent of morphine does not arise. As seen above even though, no juice may have been extracted, so long as it is Papaver, it would still be "poppy straw" if it is a part of the plant Papaver."

12. With above observation in paragraph 15 of the judgment, the Apex Court has held that poppy husk would fall within the definition of the term "poppy straw" which includes all parts of the plant. The papaver and wild seeds has been specifically excluded. The poppy husk has not been excluded from the definition of poppy straw and therefore, in our opinion, producing, possessing, transporting,

exporting inter-State, selling, purchasing, using or omitting to warehouse poppy husk would be an offence under Section 15 of the Act, inasmuch as poppy husk would fall within the term “poppy straw” as used in that Section. Therefore, the argument advanced by Mr.Buddhbhatti would not help the convict-accused.

13. However, when the Panchas have not supported the case of the prosecution and the muddamal recovered is from the residential house as alleged by the prosecution, the prosecution ought to have produced the cogent and convincing evidence as to ownership and possession of the house by the accused. This evidence could have been availed from Village Panchayat or the Revenue Records or the Records of Rights, or even by producing the proof as to the house number, vis-a-vis other reliable record from the Government. The prosecution could have proved beyond doubt that the house raided is of the ownership and occupancy of accused. Mere presence of a person in a house would not be sufficient to draw inference against that person in such a serious offence and it would not be safe to presume or assume

that as the accused was there, he may be either occupant and / or owner of the house. The raid was not carried out at the odd hours. It was evening part of the day. Panchnama has been concluded as per record at about 18:00 hours on 16/8/2001. The sun probably may not be set before that. Over and above, it is mentioned in Panchnama that, lady was present in the house and according to reference made, the lady was the wife of the accused. No evidence has been laid by the prosecution to show that no other adult member is residing or occupying the house. When the prosecution has pressed from the beginning that the accused is in habit of addiction and therefore, he has kept opium poppy in his house then, it was possible for the prosecution to prove this allegation by getting the blood sample of the accused and same could have been analyzed through F.S.L., and thereby the prosecution could have proved the important circumstance in favour of the prosecution and in turn the conscious possession of the accused. A negative evidence could have been led indirectly that the tin containing prohibited substance opium poppy was of the accused and of none else which has been

found from the house and at the instance of the accused. So, there is a weak piece of evidence as to conscious possession of the muddamal article seized from the accused. It appears that the trial Court has not applied its mind in this regard in correct perspective.

14. The other argument of Mr.Budhdhbhatti is also found valid and that is regarding infirmity found in the sealing procedure adopted by the Raiding Party Officer. It is the duty of the prosecution to prove that the muddamal article i.e. contraband article was seized and sealed and the seal was not done in a manner which can be said to be beyond all scope of tampering with it. The full proof evidence in this regard should be adduced and it should be established beyond doubt that there was no scope to tamper with the sample or the muddamal seized. Here, the Panchas have not supported the case of the prosecution and therefore, the Court ought not to have relied upon the version of the Police Officers and the contents of the Panchnama.

15. It is the case of the prosecution that the muddamal opium poppy has been seized from the house of the accused at village Modhuka of Tal.Jasdan and the same was sealed in the manner mentioned in the Panchnama Exh.11. It is alleged that two Panchas were taken with the Raiding Party and for that first part of Panchnama was drawn by complainant, Deputy Superintendent of Police, Vichhiya Police Station. To prove this Panchnama, Panch Witness No.2, Unusbhai is examined by prosecution but for reason best known to the prosecution, Panch Witness No.1 has not been examined. It is settled law that the contents of the Panchnama require to be proved otherwise the contents of the Panchnama drawn by the Police cannot be read as substantive piece of evidence. Therefore, each relevant content of the Panchnama requires to be proved. It is true that the contents of the Panchnama can be proved by the Police Officer, who has drawn the Panchnama and in whose presence the Panchas have signed the Panchnama. So in reference to prove the Panchnama at Exh.11, only piece of evidence available on record, can be said to be drawer of the Panchnama, i.e., Deputy Superintendent of Police, Gondal whose

deposition is at Exh.30 and he has stated that after drawing first part of Panchnama, he alongwith the members of Raiding Party and Panchas on the strength of the information had reached to the house of the accused at village Modhuka from Vichhiya Police Station. The door of the house was knocked and it was opened by him. Name of the accused was asked and he had given his name. The accused was informed about the secret information and on search of the house a faint pink colour tin was found and on being opened, the prohibited substance-poppy straw was found lying in a plastic bag. After weighing the prohibited substance and assessing the market value, it was seized by affixing a slip signed by the Panchas. Nothing objectionable was found from the house of the accused. It emerges from evidence that Police Sub Inspector, Vichhiya Police Station had accompanied with the Deputy Superintendent of Police, Prosecution Witness No.5-Vanrajbhai Maganbhai who is examined at Exh.30. Shri Shaktisinh Zala, P.S.I., who is examined as Prosecution Witness No.4 at Exh.15 has stated that the prohibited substance- poppy straw weighing 800 gms., valued at Rs.160/- was kept in a

cloth bag and a slip signed by Panchas was affixed. It was sealed by Police Sub Inspector, Vichhiya Police Station. The Deputy Superintendent of Police has not stated in his examination in chief about the use of the cloth bag. The cross-examination of this witness makes his version doubtful because there was no reason for this Officer to take only one cloth bag of a particular size to carry with them while proceeding to carry out the raid. This infirmity, even if ignored, the oral version of these two witnesses is not in conformity with the contents of Panchnama. Therefore, it can be said that these witnesses do not get corroboration from Panchnama at Exh.11. As contended in the Panchnama when the raiding party had entered into the house of the accused, the house was searched and in one of the room on the eastern side, tin was lying and it was containing powder of opium poppy (800 gms) and that powder was lying in a plastic bag. The same was put inside the cloth bag brought by the Raiding Party Officer and in that a slip signed by Panchas and Police was also kept and thereafter that cloth bag was wrapped by thread and was sealed by the Police

Sub Inspector, Vichhiya Police Station, meaning thereby the slip signed by Panchas and countersigned by Deputy Superintendent of Police was kept inside the cloth bag alongwith the plastic bag and there is no reference of affixing a slip singed by Panchas and countersigned by the Seizing Officer, Deputy Superintendent of Police, with seal which was affixed over the cloth bag. It is contended in Panchnama that one slip was kept inside the cloth bag and the second slip was affixed with seal. So nobody can tamper with the sealed container without tearing apart the slip signed by the Panchas.

16. Keeping of the slip signed by the Panchas in the container has been viewed with doubt by this Court in more than one decisions. I have carefully gone through the decision in case of **Ganpatram Punamram Vishnoi Vs. State of Gujarat in Criminal Appeal No.287 of 1999 decided on 7/5/2002 (Coram: Hon'ble Mr.Justice K.R.Vyas and Hon'ble Mr.Justice R.R.Tripathi)**, as well as, the decision of this Court in case of **Jitendraw @ Sanjaykumar Suryakant Desai Vs. State of Gujarat decided on 17/8/2001 (Coram:**

Hon'ble Mr.Justice B.C.Patel and Hon'ble Mr.Justice A.L.Dave) in Criminal Appeal No.323 of 1996.

Referring these two decisions, the Division Bench of this Court in case of **Navinkumar Alias Shambhuprasad Alias Bapji Chimanlal Vyas Vs. State of Gujarat reported in 2006 (1) G.L.H. 409** has held that the muddamal samples were not properly sealed as required by law and possibility of tampering of muddamal before reaching F.S.L. not ruled out.

17. As per the law laid down by this Court, the slips bearing signature of Panch Witness should be affixed on the sample and thereafter the slips should be signed so that, if any attempt is made to tamper with the sample, the slips affixed would get torned. On re-appreciation, the Court in case of **Navinkumar Alias Shambhuprasad Alias Bapji Chimanlal (supra)** has found that correct and full proof procedure of sealing was not resorted to by Mr.Vaghela and the possibility of tampering with the muddamal was not ruled out at all. This deficiency will have to be viewed in light of other discrepancy brought on record of the case.

18. In the present case, there is no reference of affixing slip on the cloth bag while putting the wax seal signed by Panchas and Deputy Superintendent of Police. On the contrary, it is mentioned that it was kept inside the bag. So the accused can get advantage of this situation in the present case. The learned Judge appears to have committed an error while convicting the accused. On a plain reading of the judgment and order of the lower Court, it is possible to infer that prohibits the law the learned trial Judge was not well assisted by the learned Counsel otherwise, the contention of the learned Judge could have been drawn to one of the above referred decisions pronounced in the years 2001.

19. The observation made by the Apex Court in case of **State of Punjab Vs. Baldevsing, reported in 1999 (6) S.C.C. 172** would obviously help the accused wherein, it was observed thus:

> *"31. There is indeed a need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating*

agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the officials concerned so that laxity on the part of the investigating authority is curbed."

20. Without commenting on the laxity further in present case and other infirmities, it would be sufficient to observe that two major arguments of learned Counsel, Mr.Budhhabhatti requires to be accepted and is accordingly accepted. The judgment and order holding the accused guilty of the charge for offence punishable under Section 15 of the N.D.P.S. Act is hereby held as not established beyond doubt. Hence, the appellant-accused requires to be acquitted.

21. In the result, the present Appeal is allowed. The judgment and order dated 24th April, 2002 rendered by the learned Sessions Judge, Rajkot in N.D.P.S. Special Sessions Case No.13 of 2001 is hereby quashed and set aside. The appellant is acquitted from the charge levelled against him for the offence punishable under Section 15 of the N.D.P.S. Act. Amount of fine, if paid, by the appellant-accused be refunded to him.

(C.K.BUCH, J.)

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